imposed on him by s. 69(c) of the Subordinate Courts Act 1948. The learned Magistrate has no power to grant the injunction sought for by the respondent/defendant and therefore it was an exercise in futility for him to have allowed the amendments. In this context, s. 66(1) of the Subordinate Courts Act 1948 cannot right the wrong that was done by the learned Magistrate. Since there was no application by any party for this Court to exercise its discretion under s. 66(2) of the Subordinate Courts Act 1948, I do not propose that the action be transferred to this Court. The issues before the learned Magistrate as can be seen from the recital of the facts in the original action are simple and straight forward and could easily be dealt with by him. In the circumstances, I allow this appeal with costs. The case is remitted to the learned Magistrate for him to dispose of the original action or suit within a week from today.

YAP SENG HOCK & ANOR.

v.

UNITED ASIAN BANK BHD. & ANOR.

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[ORIGINATING SUMMONS NO. 24-93-89]
9 NOVEMBER 1992

CONTRACT: Loan agreement - Joint and several liability of guarantors - Apportionment of liability - Compromise - Whether defendant agreed to compromise - Allegation of compromise based on unilateral statement in letter - Other positive evidence not adduced - Whether unilateral statement of agreement per se sufficient to constitute a binding contract.

EVIDENCE: Presumption of adverse inference - Evidence Act, 1950 s. 114(g) - Defendant failed to produce material witness and document - Whether presumption arose - Allegation that contents of letter constituted a binding contract - Burden of proof - Contracts Act 1950, ss. 101, 102, 103.

The first defendant (the Bank) had obtained summary judgement for RM1,028,726.02 (the original sum) against the plaintiffs and the second defendant in respect of a loan advanced by the Bank. By a consent order the original sum was varied whereby the joint and lateral liabilities of the parties were reduced to RM750,000 (the judgement sum). A clause in the consent order stated that in default of payment of the judgement sum the original sum shall be payable to the Bank forthwith.

On 13 December 1988 the plaintiffs' solicitor wrote to the Bank's solicitor enclosing payment of RM200000 as partial satisfaction of that portion of the plaintiffs' liability under the consent order, which the letter claimed to have been agreed by the Bank as being limited to RM500000 with the remaining RM250000 to be borne by the second defendant. On receipt of the letter and as therein requested, the Bank's solicitor on that same day wrote to the Senior Assistant Registrar and withdrew execution proceedings against the plaintiffs. Again on that same day the Bank's solicitor wrote to the Bank informing the bank that the plaintiffs would pay another RM300000 by 20 December 1988 and that the plaintiffs had requested for a meeting between the parties concerned to negotiate payment of the balance sum. This letter was copied to the plaintiffs' solicitor. On 27 December 1988 plaintiffs paid the Bank the promised RM300000.

The second defendant intervened in the action and claimed that as a result of a meeting held between the Bank and the parties concerned on 23 September 1988 the Bank had compromised and agreed to remit his liability to RM50000. The facts showed that on 23 September 1988 a meeting did in fact take place between the parties concerned and that the parties, including the Bank, verbally agreed that the liability of the second defendant on the judgement sum be limited to RM50000. Minutes of this meeting were taken by the Bank but the same had not been tendered in evidence.

The Bank took the consent order as not being complied with, and instituted foreclosure proceedings on two parcels of land belonging to the plaintiffs' company to recover the original sum. The plaintiffs took the present action and claimed, *inter alia*, that what transpired on 13 December 1988 was an accord and satisfaction which constituted a valid contract and the Bank was therefore estopped from claiming any further sum from the plaintiffs over and above the RM500000 which had already been paid.

Held:

[1] By virtue of the provisions of ss. 101,102 and 103 of the Contract Act 1950 the burden is on the plaintiffs to prove that the Bank had compromised on the plaintiffs' liability to pay under the consent order. The plaintiffs' affidavits, standing by themselves, were insufficient to discharge the onus cast on them by the said provisions of the Act.

[2] The plaintiffs solicitor's letter of 13 September 1988 was equivocal in nature and amounted to nothing more than a mere unilateral statement of agreement. In the absence of other positive evidence that unilateral statement is not conclusive of such an agreement.

[3] The letter as sent out to the Senior Assistant Registrar by the Bank's solicitor expresses no more than a desire to withdraw the execution proceedings because the plaintiffs and the Bank had reached agreement for settlement of the case. This agreement to settle did not mean anything as there had yet to be any settlement or compromise of the suit.

[4] The letter of 13 December 1988 by the Bank's solicitor to the Bank, apart from stating that the plaintiffs would be submitting another RM300000 by 20 December 1988 also pointed to the plaintiffs seeking a further meeting to negotiate the balance among the parties concerned. If indeed there had been the compromise as claimed by the plaintiffs it is strange that there was no word of complaint coming from them over the request to negotiate further, as by paying the RM300000 they would have fully met their liability to the Bank under the alleged compromise and therefore there was no need to negotiate further on the balance.

[5] Upon all the evidence the plaintiffs had failed to establish their claim against the Bank. There is no evidence pointing to the Bank, directly or otherwise, agreeing to absorb the balance. The evidence as a whole points to the plaintiffs being liable for the balance.

[6] The second defendant proved to be a convincing witness. The best person to refute the second defendant's story was En. Raus, the representative of the Bank present at the meeting on 23 September 1988 where the compromise by the Bank was alleged to have taken place. The Bank failed to produce En. Raus to testify though he was still with the Bank when this trial took place and there was no evidence to the effect that he could not come to the Court so to testify. There is thus sufficient material to invoke the presumption of s. 114(g) of the Evidence Act 1950 against the Bank. Likewise s. 114(g) is also applicable against the Bank in respect of non-production of the minutes of the said meeting. Accordingly the Court accepts the evidence of the second defendant as evidence of truth and declare that the second defendant's liability to the Bank was remitted to RM50000.

[Plaintiffs' claim against both defendants dismissed].

Legislation referred to:

Contract Act 1950, s. 64
Evidence Act 1950, ss. 101, 102, 103
Legal Profession (Practice and Etiquette) Rules 1978, Rule 28(a)
Rules of the High Court 1980, O. 28 r. 4

For the plaintiffs - Arthur Lee
For the 1st defendant - Ong Ban Chai
For the 2nd defendant - Gary Yuen

JUDGMENT

Richard Talalla J:

On 12 February 1980, the plaintiffs and 2nd defendant (collectively referred to as the guarantors) became liable on a joint and several guarantee to the 1st defendant (the Bank) for a

loan (the loan) granted by the Bank to a company known as Hong Huat Realty (M) Sdn. Bhd. (the company) of which the guarantors were directors. On 24 September 1986, in Johor Bahru Winding-Up Petition No. 42-41-86, the company was ordered to be wound up. The loan was also secured by a charge over 3 pieces of land (the land) belonging as to one piece to the company and as to the remaining two pieces to Hong Huat Holdings. Sdn. Bhd. (the holding company). Both companies were effectively owned by the plaintiffs.

On 10 November 1987, the Bank in Johor Bahru High Court Civil Suit No. 23-993-86 (the first action) obtained summary judgment against the guarantors for RM1,028,453.02 representing the loan with interest and costs.

On 24 October 1988, the parties hereto obtained in the first action a consent order (the consent order) whereby *inter alia* the said summary judgment was varied to read that the 2nd, 3rd and 4th defendants do pay the plaintiffs the sum of RM750,000 as follows:

(a) a sum of RM150,000 to be paid within two weeks from 24 October 1988; and
(b) the balance together with interest at the rate of 9% per annum from 7 November 1988, to be paid by way of eleven (11) equal monthly instalments commencing 1 December 1988, and subsequent instalments to be payable on the 1st of each succeeding month until full payment thereof.

Interest was to be serviced monthly, and it was further provided in the consent order that all legal costs incurred to that date in the sum of RM15,000 together with disbursements in the sum of RM8,726.25 were to be borne by the 2nd, 3rd and 4th defendants, and it was further ordered that the 2nd, 3rd and 4th defendants might redeem the three properties or any of them held as securities by the plaintiffs at the prevailing market rates at any time (those properties that were auctioned would not be included), and it was lastly ordered that in the event of any default of payment of any of the instalments, the original judgment sum of RM1,028,453.02 as at 1 March 1986, together with interest thereon at the rate of 14% per annum from 2 March 1986, to the date of realisation and costs be paid to the plaintiffs forthwith.

The consent order was not complied with. So on or about 1 December 1988, the Bank caused the goods of the plaintiffs to be seized pursuant to a writ of seizure and sale issued in the first action but the execution was suspended. No execution proceedings were taken against the 2nd defendant.

On 13 December 1988, the plaintiffs' solicitors wrote to the Banks' solicitors as follows:

> Re. Johor Bahru High Court Suit No. 23-993-86
>
> We refer to the above and have for reference the conversation between your Mr. Ong Ban Chai and Mr. Yap Seng Hock.
>
> It was agreed that in principle your clients are aware that Dato Ng Tian Seng should rightfully bear $^{1}/_{3}$ rd of the judgment sum. However due to recent developments and Dato Ng's refusal to meet his part of the liability there has been some problems with regards to the settlement sum.
>
> We now write to confirm that our clients are liable for payment of $^{2}/_{3}$ rd of the judgment sum and your goodselves will use your good offices to persuade your clients to get $^{1}/_{3}$ rd of the judgment sum from Dato Ng Tian Seng.
>
> As agreed vide consent order dated 24 October 1988 our clients liability for $^{2}/_{3}$ rd of the RM750,000 is RM500,000. Herewith we enclose Public Bank Draft No. 030817 in favour of M/s. United Asian Bank Berhad for RM200,000 and Public Bank Draft No. 030313 in favour of M/s. Ong Ban Chai & Co. for RM28,726.35 as part payment towards the RM500,000 to show good faith and we confirm that these sums have been agreed upon during the aforesaid conversation.
>
> Your goodselves have agreed to remove forthwith all execution proceedings pending or intended upon the 3rd and 4th defendants upon payment of the RM200,000 plus RM28,726.35. It is also agreed that no further steps to execute will be taken until Mr. Yap Seng Hock returns on 20 December 1988.
>
> You have also agreed to publish an advertisement in the newspapers that carried the advertisement on the auction date as 15th calling off the auction as the matter has been settled.
>
> We thank you for your cooperation.

On the same day namely 13 December 1988, the Bank's solicitors wrote to the Senior Assistant

Registrar, High Court Johor Bahru, copy to the plaintiffs' solicitors, as follows:

> Re: Johor Bahru High Court Suit No. 23-993 of 1986
>
> Per: Mahkamah Tinggi Johor Bahru
> Guaman Sibil No. 23-993/1986
> O/A No. 49-160-88
>
> Merujuk perkara di atas, kami ingin menarik balik perlaksanaan ekisikusi oleh sebab kedua-dua pihak yang menuntut dan yang kena tuntut telah mencapai persetujuan untuk penyelesaian kes tersebut.
>
> Dari itu sila arahkan bailip tuan supaya melepaskan semua barang-barang yang ditahan dan memanggil pulang penjaga-penjaga barang berkenaan apabila menerima surat ini.
>
> Bersama-sama ini kami kembarkan setem yang berharga RM4 yang dilekatkan dalam presipi untuk bayaran memfail. Sila kembalikan wang amanah yang sebanyak 500.
>
> Sila akui penerimaannya.

Again on 13 December 1988, the Banks' solicitors wrote to the Bank, with a copy to the plaintiffs' solicitors as follows:

> Re: Johor Bahru High Court
> Civil Suit No. 23-993/1986
> Application for Execution
> No. 49-160 of 1988
>
> We refer to the above matter and forward herewith a Public Bank Berhad, cheque No. 030817 for the sum of RM200,000 paid by Yap Seng Hock as part payment of the debt.
>
> Another sum of RM300,000 will be paid on 20 December 1988. They also request a meeting to be held to negotiate the balance amongst all the parties concerned.
>
> Kindly acknowledge receipt.

On 27 December 1988, the plaintiffs' solicitors wrote again to the Bank's solicitors, as follows:

> We refer to above matter.
>
> Enclosed please find a Bank Draft No. 031013 for the sum of RM300,000 payable to you by Yap Seng Hock.
>
> Please credit the same in your account accordingly.
>
> Kindly acknowledge receipt.

On 2 January 1989, the Pejabat Tanah Daerah Johor Bahru in Kulai ordered sale by public auction of land (the land under auction) being 2 pieces of the land (which the plaintiffs claim is embarrassing and damaging the holding company) to recover an amount of RM1,248,835.07 which resulted in the plaintiffs on 5 February 1989, commencing this action. On 8 February 1989, an interim injunction to stay the auction was granted in this action.

On 18 April 1990, the 2nd defendant was granted leave to intervene in this action and he did so.

The plaintiffs having obtained the interim injunction, which remains to date, claim and seek against the Bank declarations that as a result of what transpired on 13 December 1988, there was an accord and satisfaction which constitutes a valid contract and estops the Bank from claiming any further sum from the plaintiffs, that the land under auction is to remain as security for balance of RM250,000 pending recovery of the same from the 2nd defendant; in default by the 2nd defendant, the Bank may sell the land under auction to the plaintiffs for RM250,000, but in the event of due payment by the 2nd defendant the Bank to transfer the land under auction to the plaintiffs.

The Bank's reply was a denial of the plaintiffs' claim, adding that at no time did it agree or instruct anyone including its solicitors to enter into a settlement.

In as much as the 2nd defendant was claiming that the Bank had agreed on 23 September 1988 to the 2nd defendant being liable to the extent of RM50,000 only under the consent order, and a declaration to that effect, the Bank's reply was that the apportionment of liability of the guarantors was an internal matter between the plaintiffs and the 2nd defendant.

The 1st plaintiff on behalf of himself and the 2nd defendant deposed in his affidavits standing as pleadings as follows:

> As the goods seized under the writ of seizure and sale was only valued at RM7,000. The defendants agreed to suspend the seizure and sale upon our solicitors' undertaking for that sum.
>
> Soon after that, Mr. Ong Ban Chai, (who was personally known to me for several years) spoke to me and suggested that I should endeavour to settle the matter amicably with the defendants instead of dragging the matter further.
>
> I told him that I and my brother Yap Seng Chang were ready and willing to resolve the matter except that I did not see any reason

why the defendants were bent on getting the entire RM750,000 from me and my brother only (including attaching only our properties) while completely letting off the other debtor (Dato Ng Tian Seng) from the picture. I told him that it was unfair and unreasonable for the defendants to place the entire liability for the RM750,000 on me and my brother without even attempting to seek any repayment from the said Dato Ng Tian Seng.

After further discussions on the matter, Mr. Ong Ban Chai accepted my arguments. He then advised me to forward to him our share in the sum of RM500,000 and assured me that he would proceed against the said Dato Ng Tian Seng for the balance sum of RM250,000. At my request, he agreed that I could immediately forward RM200,000 first and the rest in the sum of RM300,000 within 2 weeks.

Accordingly, vide my solicitors' letter dated 13 December 1988, a sum of RM200,000 was forwarded to Mr. Ong Ban Chai's firm.

Later, *vide* my solicitors letter dated 27 December 1988, a further sum of RM300,000 was forwarded to M/s. Ong Ban Chai & Co., and the letter is very clear that it was the 'final' payment. It is also to be noted that in the letter of M/s. Ong Ban Chai & Co's letter of 27 December 1988, forwarding the RM300,000 to the defendants there is no mention of any 'meeting' as regards the balance of RM250,000.

Mr. Ong Ban Chai's present claim in his paragraph 3 that the release by the payment of RM500,000 was subject to a meeting and agreement between the 3 debtors and was further subject to the defendants consent, is not correct at all. It was within the knowledge of Mr. Ong Ban Chai that the 3 directors have already had several informal meetings (and one formal meeting with the defendants in Kuala Lumpur in which Mr. Ong Ban Chai was personally present) and the said Dato Ng Tian Seng has been persistently evasive and non-committal about payment of his share in the sum of RM250,000. In the circumstances there was no question or prospect of any further meetings between the 3 debtors to resolve the matter. The discussions between me and Mr. Ong Ban Chai concerned only the defendants (as creditors) and myself and my brother (as debtors).

The 1st defendant repeated the same thing in a subsequent affidavit standing by way of pleading, only adding that he told Mr. Ong that it appeared that the Bank was favouring the 2nd defendant and colluding with him against the plaintiffs.

On behalf of the Bank one Mr. Gopal the manager of its Johor Bahru branch deposed by way of pleading that the Bank had at no time agreed or instructed anyone including solicitors to enter into any fresh settlement, that the letters written by the guarantors' solicitor did not constitute any fresh settlement, that the apportionment of liability of the other guarantor was an internal matter among the guarantors, that the Bank could not apportion for them, that the sum due was not RM750,000 but RM1,028,453.02 as at 1 March 1986 with normal interest because the guarantors failed to observe and perform the terms of the consent order dated 24 October 1988, that the foreclosure proceedings in the Land Office were within the legal rights of the Bank and that the injunction order granted was wrong and ought to be set aside with costs.

Mr. Ong Ban Chai, the solicitor acting for the Bank in the matter (the Bank's solicitor) deposed by way of pleading as follows:

I refer to the letter written by the solicitors for the plaintiffs dated 13 December 1988. The conversation took place between myself and the 1st plaintiff, the 1st plaintiff requested that the writ of seizure and sale be withdrawn and the parties to hold a meeting with the defendants to settle this matter and would pay RM500,000 then by two (2) instalments. The 1st plaintiff suggested that he and the 2nd plaintiff pay $^{2}/_{3}$ of the debt and that $^{1}/_{3}$ was to be paid by Dato Ng Tian Seng @ Ng Kek Chuan. I told him to arrange for a meeting with the Bank to settle as I have no authority to do so.

On 13 December 1988, I wrote to United Asian Bank Berhad stated that the debtors required a meeting to negotiate.

As regards to the letter dated 27 December 1988, written by the solicitors for the plaintiffs stated the final balance of payment, I state that there was no agreement on that too.

The 2nd defendant deposed by way of pleading as follows:

Subsequently, a meeting was fixed on 23 September 1988, for the plaintiffs and I to meet with the officials of UAB at their headquarters in Kuala Lumpur. The arrangement was for the said plaintiffs together with their solicitors who at that time was the late Mr. Subra Naicker, Mr. Ong Ban Chai, solicitors for UAB and together with my solicitor, Mr. Gary Yuen to meet to negotiate for a settlement amicably. On that day, i.e. 23 September 1988, besides Mr. Ong, En. Raus

the Deputy General Manager of UAB, Kuala Lumpur and his lady officer, the late Mr. Subra Naicker, Mr. G. Yuen and I, the plaintiffs chose not to be present at the meeting.

At the meeting on the said day the question of apportionment of the debt was the main issue discussed vis a vis the said plaintiffs and myself. I had mentioned as early on as in my defence of the civil suit proceedings No. 23-993/86 (Johor Bahru High Court) that I was not at all responsible to pay any sums towards this debt to UAB notwithstanding I stood as a guarantor to the overdraft facilities. This is because when I parted my business relations with the said plaintiffs, in particular, Mr. Yap Seng Hock, it was mutually agreed that he was totally responsible to settle this matter and the debts owing to UAB. In exchange, Mr. Yap Seng Hock was allowed to collect part of a portion of my share of the money from a sales proceed (sale of a piece of land jointly owned by the said plaintiffs and I) to fully repay UAB which he promised. He collected the said money subsequently he did not repay UAB hence the proceedings under Civil Suit 23-993 at the High Court in Johor Bahru. At that meeting my stance on the matter remained unchanged. It was then that I questioned Mr. Subra Naicker as to whether he had a mandate from the said plaintiffs for the purposes of this negotiations, otherwise it would have been quite fruitless and a total waste of time if Mr. Subra Naicker had no mandate for settlement figure. Mr. Subra Naicker replied that he did and it was in the region of about RM700,000. As UAB and also Mr. Subra Naicker had already heard me that I was not at all willing to pay any amount towards the settlement of this debt, as previously stated, I had already accounted for this with Mr. Yap Seng Hock when we ceased our business relations, which I have written to UAB, I felt that the decision then was left with En. Raus to whom I also made representations and urge him to accept a settlement of the matter within the region of about RM700,000. Initially En. Raus refused. Upon further representations from myself especially, En. Raus suggested that a settlement may be forthcoming for a sum of not RM700,000 but RM750,000. I queried Mr. Subra Naicker as to whether he had instructions to extend his mandate to RM750,000 to which he replied he did not. After some talk, I, there and then requested Mr. Subra Naicker to call Mr. Yap Seng Hock who at that time was in Johor Bahru and to inform him that I wanted to speak with him and to persuade him to settle the difference between his amount offered and the amount requested by UAB for full settlement is only RM50,000. Mr. Subra Naicker placed the call through to Mr. Yap Seng Hock but he refused to speak to me after he (Mr. Subra Naicker) had spoken to Mr. Yap Seng Hock. Mr. Subra Naicker then informed us that his instructions and his mandate had not changed. It was at this moment that En. Raus looked towards me for the balance of RM50,000 and I was advised by my solicitor not to agree to pay the same. After some consultation with my solicitor and strictly for the purposes of an amicable settlement I reluctantly agreed to pay RM50,000 as that the matter could be resolved for one and for all for a total sum of RM750,000. I requested for instalment payments of RM5,000 per month for 10 months, the rest payment to commence sometime in October 1988; En. Raus agreed and further added that the judgment taken under the Order 14 application would be substituted by a consent judgment which terms are as provided in the exhibits already tendered herein. The other terms of the consent judgment was that a sum of RM150,000 was to be paid to UAB within 2 weeks from 24 October 1988, and the balance together with interest at the rate of 9% p.a. from 7 November 1988, by way of 11 monthly equal instalments commencing from 1 December 1988, costs of RM15,000 together with disbursements for RM8,726.25 and further that any one of us i.e. the said plaintiffs and I may redeem the 3 properties or any one of them presently held by UAB as securities at the prevailing market rates or to find potential purchasers to purchase the same and thereby reducing the settlement sum of RM750,000. It was without doubt that the said plaintiffs realised and acknowledged that their liability was for RM700,000, and mine for RM50,000. All parties at the meeting on that day left upon that consensus.

Such then were the pleaded cases of the respective parties.

The trial then commenced when at the outset Mr. Arthur Lee, Counsel for the plaintiff informed the Court as follows:

> My clients will not seek any contribution from the 2nd defendant whatever the outcome.

Counsel for the 2nd defendant then said as follows:

> I thank Mr. Arthur Lee for the assurance and say 50% of the issues relating to the 2nd defendant has been cleared.
>
> My client now looks for a like assurance from the 1st defendant, the Bank.

Counsel for the 1st defendant then replied thus,

> I have taken instruction from the Bank. No assurance can be given.

As to the 2nd defendant's case his Counsel commenced by requesting that the 1st defendant's representative take the stand to be cross examined, the representative being one Mr. Padmanathan who was present *albeit* he not being a deponent. There was no objection by Counsel for the plaintiff and the 1st defendant. Mr. Padmanathan then took the stand and was accordingly cross examined by Counsel for the 2nd defendant. He testified *inter alia* as follows:

> Mr. V. Gopal the manager and the person who affirmed the affidavits in this action has requested me to attend this hearing as I am more familiar with this file. Whatever Mr. Gopal has said in his affidavits is after he has consulted with me and been briefed by me. Whatever my branch does it needs instructions from the head office in this matter. Without question we will follow instructions from the head office.
>
> It is correct that I was not at the meeting at the Bank's Head Quarters on 23 September 1988, in Kuala Lumpur. But as the officer in charge of this matter I was aware that such a meeting took place. I was given a copy of the minutes of the meeting. I was only verbally informed of this arrangement of RM50,000 being paid by Dato Ng the 2nd defendant. This is not reflected in the minutes. I was informed of the RM50,000 which will be paid by Dato Ng, the 2nd defendant towards the RM750,000 agreed upon.
>
> Question : As you understood it did you take the indication from your superior to mean that the liability to pay towards the the sum of RM750,000 was only RM50,000?
> Answer : No.
>
> Question : Were you also informed by your superior that the plaintiffs were to pay RM700,000?
> Answer : No.
>
> Question : So you were not informed at all?
> Answer : No.
>
> I am not aware of the meeting on 16 November 1989 between Encik Raus the then Deputy General Manager of UAB and Dato Ng.

In fact on 21 November 1989 the 2nd defendant's solicitors had written to the Bank (with copies to the Bank's solicitors and the Bank Johor Bahru branch) as follows:

> Re- JB High Court O/S No. 23-993/86
>
> The meeting which our client, Dato Francis Ng had with your En. Raus, Mr. Shankaran and our Mr. Yuen on 16 November 1989 at your office in Kuala Lumpur with regards to the abovementioned refers.
>
> Further to that conference our client wish to thank you for meeting him to discuss the issue outstanding which is the further payment of the RM250,000; which should have been paid by Yap Seng Hock and/or Yap Seng Chang, at least to the extent of RM200,000 as agreed by their lawyer, Mr. Subra Naicker, now deceased.
>
> As you realise now our client is very much in a predicament as the lands concerned which could have been sold to redeem the balance of the principal amount (RM750,00) is now frustrated owing to the injunction obtained by the Yap Brothers; whereas at the same time they have not owned up or pay their outstanding liability of a further RM200,000, the purchasers found by our client is pressing very hard to obtain an answer to purchase the said lands in question but we are unable to reply positively whereas at the same time our client is exposed as if he is liable whereas in fact he has done his utmost to keep his part of the bargain.
>
> At the time of writing the setting aside of the injunction which was fixed for hearing on 19 November 1989 had been postponed by the Court as His Lordship had a murder trial in progress.
>
> As agreed our client shall furnish the balance of RM35,000 (previously paid RM15,000) RM10,000 to be payable on 30 November 1989 and the balance of RM25,000 to be payable on 31 December 1989, to own up his part of the bargain as was previously agreed in the earlier meeting which he had with you on 23 September 1989 and the same has been sent to M/s. Ong Ban Chai, your solicitors in JB.
>
> We shall hope in the spirit of the negotiated settlement as previously agreed the proper defaulters shall be held responsible for the repercussions for unneccesarily prolonging the settlement of this matter.

To the letter last mentioned the Bank on 4 December 1989, replied as follows:

> JB High Court C/S No. 23-993-86
>
> With reference to your letter dated 21 November 1989, we have since written to our lawyers, M/s. Ong Ban Chai & Co., who will liaise with you shortly on the matter.

Mr. padmanathan continued to testify in cross examination as follows:

> If we have committed to that and agreed amount had been paid then we will not

proceed any further. I say this by reason of my long experience as a bank officer.

After the payment of RM50,000 UAB has never executed against the 2nd defendant.

Mr. Padmanathan then looked at a copy of the Bank's said letter of 4 December 1989, and confessed to being aware of the contents of this letter.

Counsel for the plaintiffs at this juncture applied for the plaintiffs to be released as it appeared that they were not required for cross examination. Both Counsel, for the 1st defendant and for the 2nd defendant had no objection. The cross examination continued and Mr. Padmanathan testified further thus:

After the latter of 4 December was sent, execution proceedings were taken against the plaintiffs.

The fact is we are having certain properties charged to us. A sum of RM550,000 has already been paid. That makes a balance of RM200,000. Since we have got properties where an offer of RM260,000 has been made we can rely on this property to be disposed off to settle the balance. As such no other proceeding is required against the 2nd defendant.

It is correct that the whole debt of RM200,000 which remains unpaid could have been settled from the sale of the properties valued at RM260,000 if that went through we will actually have a balance of RM60,000 in credit.

The instructions in this matter which I received from my Head Quarters in Kuala Lumpur were from the Corporate Loan Recovery Division which was then headed by En. Raus bin Borhan who was the the Deputy General Manager. So it was En. Raus who gave instruction to the department here in Johor Bahru.

After payment of the RM50,000 by the 2nd defendant there were no instruction whatsoever from the Head Quarters to levying execution against the 2nd defendant.

But by the same token, notwithstanding that the plaintiffs had paid RM500,000 execution proceedings were levied against them.

We have obtained a consent judgment for RM750,000.

As far as the Bank is concerned if that sum of money has been paid then we would not proceed any further. At this stage a sum of RM550,000 only had been paid.

Since the balance of RM200,000 was not paid the consent judgment will now be void and we have the right to fall back on the original judgment sum.

As I understand it at the meeting on 23 September 1988, there were no proportionate amounts specified to be paid by the 3 defendants.

Question : If that is so how did you know as you said earlier that Dato Ng's liability was only RM50,000.

Answer : I mentioned earlier that there was nothing in the minutes to show that particular sum but it was only verbal information which I obtained.

Question : How did you know it was RM50,000.

Answer : That was just stated by one of the officer's present at the meeting.

Mr. Padmanathan was then cross examined by Counsel for the plaintiffs. The witness was referred to and looked at the consent judgment whereafter the following changes took place:

Question : In other words your Bank agreed to compromise the consent judgment with Dato Ng.

Answer : I cannot answer that.

Question : Who do you think can give the answer to that question.

Answer : En. Raus will be able to give an answer to that question.

The Bank did not write to Dato Ng to say that the RM50,000 paid or to be paid by him was not limited as to his liability in that amount and that the Bank could be looking to him for further payment.

There is no record of the Bank's solicitors wrote to Dato Ng stating that the payment of RM50,000 did not limit his liability to that extent and that the Bank may be looking for him for further payment.

Counsel for the plaintiffs then invited Mr. Ong Ban Chai Counsel for the 1st defendant through the Court to make a statement from the Bar in this regard. To this Mr. Ong replied that he had

no instructions at that point. Counsel for the plaintiff then said that he needed to ask Mr. Ong whether he had in fact written to the 2nd defendant accordingly that is to say that the RM50,000 was payable, received on a reservation qualification to which Mr. Ong answered that they issued receipts chopped "without prejudice". Counsel then put it to Mr. Ong that on 21 November 1989, the solicitors for the 2nd defendant made that offer to the Bank in place of the consent order which the Bank accepted without reservation or qualification. Mr. Ong answered in the negative.

Mr. Padmanathan's cross examination by Counsel for the 2nd defendant ended with the witness testifying that the officer in the Kuala Lumpur Head Quarters will be able to say if there was such an arrangement made between En. Raus and Mr. Gary Yuen and Dato Ng.

Counsel for the Bank had no questions to ask of him and indicated that no other witnesses were being called to testify on behalf of the Bank. Thereafter the 2nd defendant testified. In his examination in chief the 2nd defendant effectively repeated what he had deposed to in his affidavit by way of pleading. He specifically testified as follows:

> The difference is only RM50,000 Dato for full and final settlement, why don't you cough out RM50,000 and call it a day?

The 2nd defendant went on to testify as follows:

> My lawyer Mr. Gary Yuen advised me not to pay and I had a personal discussion with him and told him for the sake of concluding an amicable settlement I would be prepared to pay only RM50,000 toward the full settlement.
>
> There was one lady officer that was present but I do not know what was recorded.
>
> The lady officer was from the Bank. She was taking notes. I would think that she was taking notes of the discussion. I did not personally see the notes.
>
> If I can recollect, after the agreement by all parties that the plaintiffs would settle RM700,000 and myself RM50,000 En. Raus said for the wording of the consent judgment purposes the Bank would prefer that RM750,000 is forthcoming from the guarantors. Initially I objected very strongly on this point but after the assurance and reassurance by En. Raus that my liability is limited to RM50,000 only, only upon that reassurance did I give in to his persuasion on the wording of the consent judgment.
>
> If En. Raus did not give me that assurance I would never have agreed to the wording of the consent judgment although my lawyer has advised me if possible to have the consent judgment worded per the agreement. My reply to my lawyer was that I think we can trust a banker in the presence of my lawyer and also in front of the late Mr. Subra Naicker and the banker's lawyer Mr. Ong Ban Chai. I left the meeting on that day with the negotiated settlement.
>
> To my knowledge the Bank has not written to me or my lawyer including any of these letter.

The 2nd defendant was cross examined by Counsel for the parties. The 2nd defendant was referred to and looked at a letter dated 17 October 1988, from the plaintiffs' solicitors to the 2nd defendant's solicitors reading as follows:

> Re: JBHC C/S No. 23-993 of 1986
>
> We refer to your letter of 7 October 1988
>
> To remove and reduce any misunderstanding in the matter, we set out as follow the recent position in the matter:
>
> 1. The liability to pay UAB in joint and several by our respective clients.
> 2. Our Mr. Subra Naicker attended the KL meeting to negotiate for an amicable settlement of UAB's clients.
> 3. At your client's insistence and on a without prejudice basis our Mr. Subra Naicker disclosed the figures (i.e. RM600,000 - RM700,000) our client had in mind towards the proposed settlement. We do not know what figure your client had in mind.
> 4. Eventually, UAB agreed at RM750,000 plus interests thereon from date of agreement to date of full repayment.
> 5. There was at that stage no question of any apportionment of the RM700,000 as between your client and our client. This was to be resolved personally between our respective clients in due course.
> 6. Likewise, as regards the first payment of RM150,000 there was no agreement as to any apportionment except that it was agreed that UAB must be paid this sum at the earliest.
>
> We confirm that a few days ago your client did telephone our Mr. Subra Naicker and requested him to arrange a meeting with our client wherein the matter could be discussed and resolved. When we recently spoke to our client he had instructed that in fact since then your client had met our client and had

a discussion but were unable to reach any agreement on the matter. Nevertheless our clients proposals are:

1. As regards the RM750,000 our client is prepared to pay RM375,000 and your client to pay the remaining RM375,000.
2. Likewise, the interest and the costs to be paid is to be paid equally.
3. As regards the first payment of RM150,000 our client is prepared to come up with RM75,000 forthwith and your client should come up with the remaining RM75,000.

Kindly revert to us with your client's instructions please. If you fail to respond, our client proposes to make this offer directly to UAB.

The contents of this letter are true in every respect. After the meeting on 23 September 1988, there was no question of any apportionment.

The 2nd defendant was then referred to and looked at a letter in reply dated 22nd October, 1988 from the 2nd defendant's solicitors to the plaintiffs' solicitors which he testified was true in all respects. The letter last referred to reads as follows:

Re: JB High Court C/S No. 23-993 of 1986

Your letter dated 17 October 1988 with regards to the abovementioned refers and we have instructions to reply thereto.

While the contents of your letter is true it must be taken in the light that it was and still is common knowledge between our client and your client, Mr. Yap Sing Hock that when our client resigned as a Director from the company on 1 May 1982 your client's share from the proceeds of sale from a particular piece of property as agreed between the parties at that time, included your client's obligation and his duty to settle this outstanding loan with UAB, which he did not - consequently this civil suit.

Further, whilst at the meeting at UAB, KL in the presence of En. Raus the Deputy General Manager, upon the non acceptance of the RM700,000 offered (and all the while our client maintaining and still maintains that Mr. Yap Sing Hock had taken the proceeds of sale and failed to settle this loan although promised to do so) En Raus looked toward our client for the additional RM50,000 and for the purposes of an amicable settlement our client eventually agreed to furnish the same via instalment payments at RM5,000 a month.

As your Mr. Subra Naicker is aware, the stance taken by our client had always been maintained by him in his various affidavits and also at the meeting at UAB, KL on 23 September 1988.

On the question of apportionment it was true that our client and your client would meet to resolve the same - no agreement was reached.

Our client maintains his *status quo;* i.e. he does not and will not agree to the apportionment of 50% liability of the RM750,000 or any other apportionment, together with interests and costs nor to the suggestion of your client to contribute RM75,000 towards the 1st instalment payment of RM150,000 simply because Mr. Yap Sing Hock is totally liable for the same. However, our client shall own up to the RM50,000 which he had promised and he will do his best to find prospective purchasers for the 3 pieces of land now held by UAB and upon a sale going through the proceeds to be used to reduce the debt.

The cross examination then continued and the following exchanges took place:

Question : I put it to you that it is true that the question of apportionment in regard to the liability of RM700,000 was not agreed to between yourself and Dato Ng.

Answer : Yes, it was not agreed.

Question : As at 24 October 1988, there was still no agreement reached, that is when the consent order was entered.

Answer : There was no agreement reached but there need not be one.

Question : I put it to you that there was a necessity to meet as indeed stated in the letter of 22 October 1988.

When we wrote that letter at the back of my mind I am looking towards Yap Seng Hock to even pay for RM50,000 which I have agreed to pay the Bank in the meeting of 23 September 1988.

The witness was then referred to and looked at paragraph 5 of the letter of 17 October 1988 set out above and the exchanges continued.

Question : This simply means that there was no question of your being absolved from payment of RM700,000.

Answer : As far as I am concerned I am only liable for RM50,000.

Question : I put it to you that by this the plaintiffs are saying that you are not absolved.

Answer : The plaintiffs can write what they want and we have also written to them that my maximum liability is RM50,000, my lawyer has written to the late Mr. Subra Naicker, carbon copy to UAB.

The RM50,000 was to be paid in an equal instalment. I did not pay promptly I would not consider that I defaulted in payment.

The issues, as I see it, as between the plaintiffs on the one part and the Bank on the other part as a result of what transpired on 13 December 1988, and secondly as between the 2nd defendant on the one part and the Bank on the other part as a result of what transpired on 23 September 1988, there was a dispensation or remission or acceptance of some satisfaction instead of performance of promise, within the ambit of s. 64 (section 64) of the Contract Act 1950. The two issues are issues of the fact. Accordingly pursuant to the provisions of O. 28 r. 4 of the Rules of the High Court 1980, Counsel for the defendants consenting and Counsel for the plaintiffs saying that he would abide by any directions made by the Court, certain affidavits filed in this action were directed to stand as pleadings and it was further directed *inter alia* that the action proceed to trial. The trial having taken place, I considered all the evidence, affidavits, *viva voce* and documentary, in arriving at my findings.

Section 101 of the Evidence Act 1950 (the Act) provides that whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. It is stated in s. 102 of the Act that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In s. 103 of the Act it is provided that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The plaintiffs in seeking to establish their claim of compromise against the Bank relied on no more than their affidavit evidence and the letters adduced in evidence. Their story was denied by the Bank's solicitor who likewise deposed to the same in an affidavit. The affidavits standing by themselves were insufficient for the plaintiffs to discharge the onus cast on them by the said provisions of the Act. The plaintiffs were present at the trial for cross examination on their affidavits. The Bank declined to cross examine them. The Bank's solicitor was present at the trial as Counsel for the Bank but the plaintiffs did not object to his appearing as Counsel despite Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, which provides that an advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests. What is more the plaintiffs did not require the Bank's solicitor to be cross examined on his affidavit deposing to a denial of the alleged compromise. The factual situation between the plaintiffs and the Bank thus far continued neutral with the onus still awaiting discharge by the plaintiffs. The plaintiffs sought to rely on the contents of the letter of 13 December 1988, set out above and the several references therein to agreement and confirmation. There was no evidence of a reply as such to that letter, a point which ordinarily would have lent support to the plaintiffs' claim, though not necessarily conclusive. In my view the unilateral statement of agreement in the absence of other positive evidence, is not conclusive of such an agreement; not at any rate in this instance. The plaintiffs also looked to the letter above set out to the Senior Assistant Registrar to establish their case of compromise. An examination of that letter shows it as expressing no more than a desire to withdraw the execution proceedings because the plaintiffs and the defendant had reached agreement for settlement of the case, a statement which upon all the evidence I find to be factually correct. There was agreement. That is why the execution proceedings were withdrawn but there had yet to be settlement or compromise of the suit. Such had to be the situation because on the same day the Bank's solicitor wrote to the Bank that another RM500,000 would be paid on 20 December 1988, adding, and, this is crucial, that the plaintiffs

requested a further meeting to be held to negotiate the balance amongst all the parties concerned. The plaintiffs had knowledge of this communication to the Bank because the letter was copied to their solicitors. Yet there was no word of complaint from the plaintiffs as would have been expected if indeed there had been the compromise they claimed. On the contrary, the plaintiffs in the face of the letter went on to make the second payment by draft enclosed in their solicitors' letter of 27 December. The correspondence could not and was not considered in isolation. Harking back to the letter of 13 December I could not see how there could have been the agreement therein claimed when in the same letter the Bank's solicitor was exhorted to persuade the Bank to get the balance of the judgment sum from the 2nd defendant and on the same day the Bank's solicitor sought the said meeting to negotiate the balance amongst all the parties. I find the letter of 13 December to be equivocal. It did not speak to what the situation would be if the balance was not recovered from the 2nd defendant. I could find no evidence pointing to the Bank, directly or through its solicitor, agreeing to absorb the balance. The evidence as a whole points to the plaintiffs being liable for the balance.

I accept the evidence of the 2nd defendant as to what transpired at the meeting on 23 September 1988, and that the plaintiffs' solicitor, the late Mr. Subra Naicker, agreed after due consideration with the 1st plaintiff that the plaintiffs would be liable for RM700,000 under the consent judgment leaving a sum of only RM50,000, the balance thereunder, to be paid by the 2nd defendant. I find that the plaintiffs thereafter sought to renege on their agreement and prevaricate but relented when they came face to face with the 2nd defendant and his solicitor who was present at the meeting in September 1988, and this resulted in Counsel for the plaintiffs making the declaration *ex post facto* that the plaintiffs would not seek any contribution from the 2nd defendant whatever the outcome.

I find upon all the evidence that the plaintiffs have failed to establish their claim against the Bank and that they are not entitled to the relief sought.

The interim injunction granted on 8 February 1989, is vacated. The plaintiffs' action against the Bank is dismissed with costs to be taxed. As between the 2nd defendant and the plaintiffs I find upon all the evidence and the declaration made by Counsel for the plaintiffs that the plaintiffs are not entitled to any contribution from the 2nd defendant under any judgment or order heretofore given in Johor Bahru High Court Civil Suit No. 23-993 of 1986 and, as applied for by Counsel for the 2nd defendant, there being eventually no objection to the same, it is adjudged and declared accordingly. The plaintiffs are to pay the 2nd defendant's costs of his claim against the plaintiffs, to be taxed.

As between the 2nd defendant and the Bank I accept the evidence of the 2nd defendant in preference to the evidence given on behalf of the Bank. There was the ring of truth in the 2nd defendant's testimony. He was not broken in cross examination. I found him to be a convincing witness as to the truth. The best person to refute the 2nd defendant's story was En. Raus, the representative of the Bank present at the meeting on 23 September 1988, where the compromise between the Bank and the 2nd defendant took place. It appeared that En. Raus was still with the Bank when the trial took place yet he did not come forward to testify. In any event there was no evidence to the effect that he could not come to Court so to testify. Minutes of that meeting were taken on behalf of the Bank. The minutes were not forthcoming in evidence. The secretary who took down the minutes did not testify. It is provided in s. 114 of the Act that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case and that judicial and official acts have been regularly performed. Illustration (g) of that section provides that the Court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. I apply the presumption and accordingly find that if Encik Raus had given evidence his evidence would have been unfavourable to the Bank and conversely favourable to the 2nd defendant. I apply the presumption likewise in respect of the secretary's failure to give evidence and the non production of the minutes. The evidence of Mr. Gopal and Mr. Padmanathan insofar as they were relevant to the issues were effectively hearsay and expressions of opinion and inadmissible in evidence. Even if their evidence was

admissible and insofar as that evidence contradicts the evidence of the 2nd defendant I reject their evidence and accept the evidence of the 2nd defendant as evidence of truth. Accordingly as sought by Counsel for the 2nd defendant I find and declare that the 2nd defendant's liability to the Bank was remitted to the sum of RM50,000 only and inasmuch as the sum last referred to has been duly paid the 2nd defendant's liability to the Bank is at an end. The Bank is to pay the 2nd defendant's costs of his claim against the Bank, to be taxed.

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